REMEDIES EXAM NOTES

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2: Contractual Damages

Measure of Assessment

Intro

- **WRITE:** P has an arguable action for breach of contract with D, who failed to [what term was breached]
- Subject to limiting principles, damages for breach of contract **issue as of right**.

List the heads of loss:

- Damages can issue for a:
  - Direct loss [of the value from the promised performance. Give example]
  - Consequential loss [of profit on subsequent transaction; expenses incurred as a result of breach]

- P bares the onus of proving the loss. If this is not possible (or where limiting principles apply) the court may award **nominal damages - or possible vindicatory damages** for breach of the right to performance itself.

Measures of assessment below:

- Expectation measures
  - Loss of Profit
  - Deference in market value for goods
  - Rectification measure

- Reliance Loss (expenses wasted)
- Disappointment and distress (Failed Holiday)

Expectation measure (default)

- **Expectation damages** is the prima facie measure of damages in breach of contract (*Clark)*
- The aim is to put the P in the position as if the contract had been performed: (*Robinson, Amann).* Thus expectation damages act as a financial substitute for performance of the primary contractual right.

- **Objective or Subjective measure of value/use of good?**
  - **Objective:** Expectation measures are to be calculated on an **objective** basis **at the time of breach**, and do not depend on the plaintiff's subjective or actual use of the right or good after breach (*per Hayne J in Clarke)*
  - **Subjective:** It could be argued (*per Gageler J in dissent in Clark)* that a subjective value of the good/right is to be preferred, taking into account how the P intended to use the good.
    - Eg in *Clark* the fact that the P could not make a profit on the sperm sticks and would recoup the loss from customers mean no loss was incurred

3: Tortious Damages

What is the tort committed?

- Trespass to land or fixtures
- Private nuisance (noise, smell etc)
- Damage to goods
- Conversion
- Deceit or negligent misstatement

Interference with Land and Fixtures

Note Vindicatory damages may also be available

- **INTO WRITE**: The general measure of compensatory damages in tort is the **reliance measure**, where damages seek to place the P in the position had the wrong never occurred (*Livingstone)*

No material damage to fixtures/land (trespass, or nuisance noise/smell)

Normative loss for interference with rights

- **Minor Trespass:** The P may recover nominal damages for trespass constituting transitory, minor interference with the right to exclusive possession of land.

- **Noise/Small Nuisance:** Primary measure of loss will be loss of amenity, a non-pecuniary head of loss measuring the extent to which enjoyment value of the land has been diminished based on an intangible interference.

- More substantial substitutive damages may be awarded for **vindication** of the right itself (Topic 6) where the interference is more serious, or **gain based damages** where the D has been conferred a benefit (*Topic 11)*

Material damage or destruction is caused to land/fixtures

- **WRITE:** Where land or fixtures are damaged/destroyed, the general measure is the **cost of repair**/**'reinstatement damages'** when destroyed (the cost of restoring the land or fixture to before the damage) (*Evans)*

- Where the **diminution of market value** (difference between the market value pre and post tort) is less that the cost of repair, the former will be preferred (*Pantalone)*
- The court will assess if the P's insistence of the cost of repair measure is ***reasonable*** despite is more significant cost**.**

    - **Is cost of repair reasonable?** The court will weigh the advantage of repair to the P vs the extra cost placed on the D. Matters influencing this assessment are;
        - nature of the property as **residential** (sentimental value to a family, *per Evans*) or **commercial** (favours diminution of market value, able to find alternative, per *Pantalone)*
        - The possibility of finding an equivalent **replacement on the market**, or conversely the unique nature of the property
        - Would market value leave the P with no or little damages, because the value of the property was already almost 0 (*as in Evans)*
        - Large disparity between cost of repair and diminution of market value (*Pantalone commercial property)*

Consequential Losses

Debt, Liquidated Damages and Penalties Doctrine

Debt

- A **debt** is the fulfilment of a primary duty under contract to pay an agreed sum (it is not damages, and does not depend on a wrong). Eg you monthly phone bill
  - Principles of factual causation, mitigation, remoteness etc do not apply

Liquidated Damages Clauses

- **A Liquidated damages clause** is a contractual term stipulating that a breaching party will pay an agreed sum of money on breach of a contractual duty.
- Prima Facie they are enforceable, unless the sum is deemed to be a **penalty in breach of the penalties doctrine** (rather than a reasonable estimate of the damages that would be awarded at common law)
  - Different from a debt in that it is only payable on breach of a primary duty**.**
  - Principles of factual causation, mitigation, remoteness etc do not apply. Only consider if the pre-condition term is met

Penalties Doctrine – Is the liquidated damages clause void as a penalty?

Where the clause is not valid, common law damages will be applied by the court.

1) Does the penalties Doctrine Apply?

- a) Applies most obviously where a money sum is to be paid upon breach of another term of the contract
  - Eg If Han breaches clause 1, he must pay Jane $100
- b) Also applies for a **collateral stipulation** where, upon failure of a primary stipulation, an additional detriment to the benefit of the other party is imposed. (*Andrews)*
  - Eg Han undertakes to pay Jane $100, unless Han delivers Jane certain goods by the end of the month.

    Two caveats to a collateral stipulation
  - (i) The prejudice suffered **must be quantifiable in monetary terms**
  - (ii) To be deemed collateral, the second stipulation must depend or arise on 'breach' of the primary. If it does not, it is likely an **additional** stipulation, and will not enliven the penalties doctrine.
    - *eg a term stating hire on weekdays is $10. But then **an additional clause:** If hiring any other day, you agree to pay $50. This will not fall foul of the penalties doctrine as the primary does not depend on failure of the second.*

2) Is the clause a penalty?

WRITE: The general prohibition test from *Dunlop* is modified by the majority in *Paciocco,* in substance allowing a large disproportionate sum to be extracted if it serves a 'legitimate interest' of the business. The relevant indicia, which are said to operate as as a guide rather than determinative rules, are;

- 1) Description of the payment is not decisive (as a liquidated damages clause or a penalty);

5: Equitable Compensation (from a fiduciary)

Intro

- D is a fiduciary owing duties to P, and has likely breached these duties by:
    - [X] has misapplied trust assets, making an unauthorised disbursement which may be falsified by the P. This will involves an account in common form.
    - [X] has placed themselves in a position of conflict with their fiduciary duties (no conflict, no profit rule) (explain how). This involves an accounting process of wilful default (*Wheeler)*
    - [X] Has breached their equitable duty of care and skill (explain how). This involves an accounting process of wilful default
- Common across equitable compensation is the aim of restoring the actual value of the thing lost through breach (*Dawson).* Assessment is made at the time of trial, using the benefit of hindsight (*Canson)*

Unauthorised disbursements

- It is likely that the money here was held on trust.
- In breach of their fiduciary duties D has misapplied trust assets by making an unauthorised disbursement [explain exactly how! – eg where the instruction was to not invest in a business that harms animals]
- Using an account in common form, the P may falsify the dispersement, creating a custodial duty for the fiduciary to make good the value of the trust **for the whole value of the falsified dispersement.**

Orthodox view in Dawson – Equitable Debt

- The orthodox approach to an unauthorised disbursement is analogised to an **equitable debt**, and thus is free from limiting principles of **causation and remoteness** (*Dawson).*
- On this analyses any loss suffered after the unauthorised disbursement (no matter how innocent or unforeseeable) must be made good by the D (*evinced in the overall outcome of Youyang; Elderman J in Agricultural Land Management)*
- If its **property**, can get the property back or a financial substitute.
- Note it may be possible to get money back by falsifying a dispursement (ie to buy shares that harm animals against the trust direction) and to hold onto shares!

Other view – Loss based remedy from (AIB)

- The uncertainty of authority in this area makes it possible for the D to argue a loss based analysis should be used (UK case AIB)
    - If loss base is accepted, then P cannot claim where they are better off from the unauthorised dispersement
    - **Commercial context factors:** In AIB, because the trust was transitory, arose from contract, and played only a bridging role in facilitating a wider commercial transaction, *Lord Toulson* favouring a loss measure.

Essays

<u>Advice</u>

- Conclusions can be grey:
    - In some respects, the statement was correct. But in other regards it appears incorrect or unconvincing
    - General approach should be accepted, however an exception for scenario abc should be applied

- Raise and address counter arguments
- Acknowledge complexity or where the law is **ambiguous** or **unresolved**

Vindicatory damages

Consider how it applies in Contract and Tort, and does not apply in statute

<u>What is it and when is it available?</u>

- **WRITE:** Vindicatory damages are traditionally awarded at common law for normative loss, a loss which is presumed to have been suffered from breach of the right or interest itself (Varuhas; <u>*Ashby; Ratcliff*</u>) Or As argued by *Stevens,* they are 'substitutive' for the primary right. Vindicatory damages seek to protect fundamental rights and interests and signal their importance by ensuring significant damages are available even where no material loss is suffered, thus giving effect to the normative policy of the given action (*Varuhas)*.
    - Normative damages are traditionally available for *breach of* ***torts*** *actionable per se (Plenty)* or *breach of* ***contractual*** *promise (*ie Wrotham Park)

    - **Not available***:* ACL, or tort actions where factual loss is the gist of the action (ie negligence and deceit).

    - <u>*Asby v White*</u> the P was awarded normative damages after his **voting rights** were violated (prevented from voting) – this was despite the party he voted for winning regardless.

- The **<u>features</u>** of **<u>torts</u>** damages damages support this normative aim (*per Varuhas, The concept of Vindication)*
    - Actionable per se for the slightest invasion of these fundamental rights, and prima facie the D is liable for breach unless they can justify their action
    - Factual causation is not relevant
    - Liability is usually strict (*Varuhas)* – this indicates the protective nature of the rights applied by the law
    - Defences are construed narrowly

- **Primary right shapes the remedy:** the policy concerns of the primary right shapes the approach to damages, illustrating a strong connection between right and remedy.